IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE, CIVIL JURISDICTION

FAMILY COURT APPEAL NO.60 OF 2001

Lt. Col. Shambhu Prasad Shaw,)
Age Adult, Occupation Army)
Officer, Presently residing)
at HQ. Engineer, Bathinda Zone)
PO Bhathinda Cantt.)
Punjab-151 004)..APPELLANT

Versus

Mrs. Sunita Shaw,)
Age 48 years, Occupation)
Business, residing at Divya)
Boutique, Next to Sahyog)
Trader Near Mishra Sweet Shop,)
CME Market Campus, Pune-411 031)..RESPONDENT

Mr. S.G. Surana, for the Appellant.

CORAM:F.I. REBELLO & ANOOP V. MOHTA, JJ.

DATED: 9th August, 2004.

ORAL JUDGMENT (PER F.I. REBELLO, J.)

Appellant, husband had filed the petition against the respondent wife in the year 1998 for divorce under Section 13-1(ia)(ib) of Hindu Marriage Act. The respondent, wife filed reply contesting the allegations. Issues came to be framed which are set out in paragraph 6 of the judgment. The first issue was whether appellant proves that the respondent after solemnization of the

marriage treated the appellant with cruelty. This was answered in the negative. The second issue was whether the appellant proves that the respondent has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. That was also answered in the negative. In the matter of custody, it was held that the respondent wife shall have custody of Arpita minor daughter. The son Divyapunj by then was a major. No order was passed in so far as he is concerned. The learned Judge also rejected the plea for permanent alimony as no decree for divorce had been passed. The learned Judge also rejected the plea for maintenance allowance under Section 26 of the Hindu Marriage Act for the children Divyapunj and Arpita.

2. At the hearing of the Appeal on behalf of the appellant learned Counsel has confined his challenge to the grounds of cruelty. It is his contention that the learned Judge failed to consider that the appellant had proved the acts of cruelty and as such was entitled to a decree of divorce on that ground. It is further pointed out that the averments in the written statement made by the respondent, more specifically in paragraph (J) that by itself would amount to act of mental cruelty and on this ground also the appellant would be entitled to a decree for divorce. Reliance is placed on the very same judgments which are set out in paragraph 27 of the judgment of the Family Court.

3. The question really is whether the appellant has made out a case of mental cruelty warranting interference by this Court in the judgment of the Family Court. The test to be applied to all such matters is not whether another view is possible, but whether there has been misreading of the evidence or non-consideration which would lead to a different conclusion, than arrived at by the learned Family Court.

While considering Issue No.1 whether the appellant was treated with cruelty, the learned Family Court has considered eleven acts of cruelty as were alleged on behalf of the appellant. The allegations of cruelty No.1 and Cruelty Nos.2 and 3 are remote in time in as much as they were at the time when the marriage had taken place. The learned Family court has considered the evidence and has recorded findings. Nothing has been shown to warrant a conclusion that the said findings are perverse or based on no material. On the contrary in our opinion the learned Family Court has correctly appreciated the evidence and has drawn the correct conclusion. In so far as cruelty No.4 is concerned, the learned Family Court has recorded a finding that the appellant was unable to establish the said act of cruelty in the absence of examining any member of the family. In so far as cruelty No.5 is concerned again the learned Family Court held that this is merely a bare

version of the appellant unsupported by any evidence and held that as such cruelty was not established. Similarly, the Family Court held that the acts which according to the Appellant constituted cruelty Nos.6 and 7 were not established.

Cruelty Nos.8, 10 and 11 were in respect of what the appellant avers are mis-treatment of his daughter Aripita by the mother-respodnent. The allegation was that the respondent mother used to confine the daughter in the house and used to torture her and she was undernourished. Reliance was placed on some letters written by the minor daughter which are reproduced by the learned Family Court while considering issue of cruelty No.8. What appears is that the mother and the son used to go to Bombay to purchase articles at the end of the month, at that that leaving the daughter behind. Considering the age of the daughter she used to keep her in the house. The essential requirements like food were also kept. This act by itself cannot be said to result in ill treatment or mistreatment of the daughter. The learned Family Court has appreciated the evidence which has come on record and on consideration of the evidence held that the cruelty upon the daughter Arpita cannot be established. Even otherwise it is difficult to hold that this would amount to mental cruelty as alleged on behalf of the appellant considering that it is the respondent who was looking after the child when the appellant

was away on duty. In so far as cruelty No.10 is concerned it was in the matter of the daughter receiving money orders. It is, however, come on record that after complaint by the Appellant about non-receipt of the money order by the daughter, the daughter started receiving money orders. The Family Court has also discussed that aspect in para.25 of the judgment. Similarly, in so far as the acts constituting cruelty No.11 was concerned it is in the matter of respondent not permitting the daughter to attend to the phone calls by the appellant. That again, from the evidence on record, the learned Judge has come to the conclusion that after the appellant sent telegram to allow the daughter to receive the phone calls the daughter used to receive the phone calls. No evidence is led in respect of cruelty No.9. Thus all the allegations of cruelty made in the plaint by the petitioner were held as not established.

4. We then come to the contention as raised by the appellant that the allegations in the written statement by themselves would constitute cruelty. As pointed out earlier they are set out in paragraph (j) of the written statement. In so far as that aspect is concerned, the daughter was examined. From the evidence on record and the pleadings it is clear that the respondent has only deposed to the fact as to what according to her the Gynecologist, who examined the daughter, had opined. This being purely based on the

opinion by the Doctor really cannot be said to mean an act of mental cruelty. No doubt the daughter was examined. The application of medicine has been established. The question is whether merely because the respodnent has averred as to the opinion given by the Medical Officer, can it be said that the said act amounts to an act of mental cruelty. In our opinion considering the nature of the pleadings both parties rightly did not examine or cross examine the daughter on that aspect of the matter. The learned Judge of the Family Court, however, after considering all aspects has rejected the contention of the appellant even otherwise by itself it could not be a ground for divorce. These are purely matters of appreciation of evidence. We do not find that the view taken by the learned Appellate Court was not a view possible of being taken and/or has been taken by ignoring the evidence either documentary or oral. In the light of that the order cannot be faulted with.

5. The last submission on behalf of the appellant is that the order does not provide for visiting rights to the appellant to his children. We find from the order of the Family Court that it has not been so provided. Considering the above in our opinion it would be proper that the Family Court in this matter is directed to consider the claim of the appellant for visiting rights and after hearing the parties to pass appropriate orders according to law.

6. While not interfering with the impugned order, we are however, remanding the matter to the Family Court only on the limited issue of visiting rights to the appellant father. On the records being received the Family Court to decide the same within a period of three months. Appeal partly allowed accordingly. Appeal stands disposed of. However, it will be open to the respondent, if in law she is so entitled to apply for maintenance for herself and minor daughter. The order of maintenance passed to continue for a period of three months only on the expiry of which period unless there is any order by the Family Court that order will stand vacated.

(F.I. REBELLO, J.)

(ANOOP V. MOHTA, J.)